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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ANGEL LUA,

Defendant and Appellant.

F074709

(Super. Ct. No. 15CR-05186)

**OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Timothy E. Warriner for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Luis Angel Lua was convicted of assault with a deadly weapon, dissuading a witness, and two counts of making criminal threats, all with associated gang

enhancements, in relation to the stabbing of R.C., a minor, and threats made to R.C. and his mother, Melissa C.<sup>1</sup>

On appeal, Lua challenges the indeterminate sentence of 14 years to life imposed for his conviction on count 4 for dissuading a witness in violation of Penal Code section 136.1, subdivision (b)(1).<sup>2</sup> The sentence was based on a gang enhancement under section 186.22, subdivision (b)(4)(C). As we explain, section 186.22, subdivision (b)(4) applies to enhance a sentence for dissuading a witness only when conviction is obtained pursuant to section 136.1, subdivision (c). Because this enhancement is inapplicable to Lua's conviction under section 136.1, subdivision (b)(1), we reverse the sentence on count 4 as unauthorized and remand for resentencing.

We reject Lua's separate contention the court reversibly erred in excluding testimony regarding a prior consistent statement by Melissa. Accordingly, we otherwise affirm the judgment.

### **PROCEDURAL HISTORY**

Lua was originally charged with shooting at an inhabited dwelling<sup>3</sup> (Pen. Code, § 246; count 1), with a gang enhancement pursuant to section 186.22, subdivision (b)(4); assault with a deadly weapon (§ 245, subd. (a)(1); count 2), with a gang enhancement pursuant to section 186.22, subdivision (b)(1)(B); criminal threats against R.C. (§ 422, subd. (a); count 3), with a gang enhancement pursuant to section 186.22, subdivision (b)(1)(B); a felony violation of dissuading a witness, Melissa, from reporting a crime (§§ 136.1, subd. (b)(1); 1192.7, subd. (c)(37); count 4), with a gang enhancement

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<sup>1</sup> To preserve the privacy of the victims and witnesses, we refer to them by their given names or initials. No disrespect is intended.

<sup>2</sup> Undesignated statutory references are to the Penal Code.

<sup>3</sup> Lua was acquitted on count 1 and the charge does not relate factually to any of the other counts. Accordingly, we do not discuss the allegations in support of count 1 in any detail.

pursuant to section 186.22, subdivision (b)(1)(C); and criminal threats against Melissa (§ 422, subd. (a); count 5), with a gang enhancement pursuant to section 186.22, subdivision (b)(1)(C). As to each count, the People alleged Lua had suffered a prior strike and prior serious felony conviction. (§§ 667, subds. (a)(1), (b)-(j), 1170.12, subd. (b).)

Prior to the start of testimony, the court granted the prosecutor's oral motion to amend the information as to the gang enhancements to counts 4 and 5. The enhancement to count 4 was amended to allege an enhancement pursuant to section 186.22, subdivision (b)(4), and the enhancement to count 5 was amended to allege an enhancement pursuant to section 186.22, subdivision (b)(1)(B).

The jury acquitted Lua on count 1 and found him guilty on counts 2 through 5 and the associated gang enhancements. In bifurcated proceedings, Lua admitted the prior strike and prior serious felony conviction.

On count 2, Lua was sentenced to a term of 18 years, comprised of the upper term of four years, doubled to eight years based on the prior strike conviction, and enhanced by five years each for the gang enhancement and prior serious felony enhancement. On count 4, he was sentenced to an indeterminate term of seven years to life based on the gang enhancement, doubled to fourteen years to life based on the prior strike, to be served consecutively to the sentence on count 2. Sentence on the remaining counts was stayed.

This timely appeal followed. However, during the pendency of the appeal, the California Department of Corrections and Rehabilitation (CDCR) sent a letter to the trial court opining that Lua's life sentence for violation of section 136.1, subdivision (b)(1) was contrary to *People v. Lopez* (2012) 208 Cal.App.4th 1049 (*Lopez*), which held that gang allegations brought pursuant to section 186.22, subdivision (b)(4)(C) can only

enhance the sentence for a conviction obtained under section 136.1, subdivision (c)(1).<sup>4</sup> As a result of the letter, the trial court held a hearing and purported to correct the abstract of judgment to reflect Lua was convicted pursuant to section “136.1(b)(1)(c).”<sup>5</sup>

### **FACTUAL BACKGROUND**

Only a brief recitation of the facts is necessary for disposition of the issues on appeal.

On the night of August 22, 2015, R.C. and Melissa were entering their car outside their apartment when another car pulled up behind them, containing a female driver and at least four young men or boys. Two males exited the car and approached Melissa and R.C. with bandanas or shirts pulled over their faces. One of the males had what appeared to be the handle grip of a pistol in his waistband and a knife in his hand. The man stabbed at R.C., injuring him slightly. He told Melissa and R.C. that R.C. needed to leave town or he would be killed. The assailant moved his thumb across his throat, motioning as if to say R.C. would be killed. He also told Melissa, “Call the cops, bitch, you’re next.” The assailant yelled out, “Planet Sur Trece” and the other men were throwing up gang signs. A female approached Melissa out of nowhere, referred to the assailant as “Psycho,” and told the assailant to get back in the car.

Melissa called 911 from her apartment. Her 911 call was played for the jury. In the call, Melissa informed the dispatcher R.C. had been stabbed and she stated, “I know

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<sup>4</sup> Lua filed a motion to augment the record with CDCR’s letter. The People opposed the request on the ground the letter was not before the trial court at the time of sentencing and therefore not a proper subject of augmentation. However, the trial court subsequently held a hearing and amended the abstract of judgment in response to CDCR’s letter. The record on appeal was augmented to include the hearing transcript and amended abstract, but not the letter itself. Good cause appearing, it is ordered that appellant’s Motion to Augment, filed on March 29, 2018, is granted. The Clerk/Executive Officer of this court is directed to file appellant’s Exhibit A, received by this court on March 29, 2018, which will be deemed part of the record on appeal.

<sup>5</sup> There is no subdivision (b)(1)(c) in section 136.1.

who it was.” She reported the assailant’s name was Luis, he was 19 years old, and he was referred to as “Psycho.” She also reported R.C. had another encounter with Psycho earlier that month.

A sheriff’s deputy responded to the apartment complex and met with Melissa and R.C. Melissa told the deputy she recognized Lua as he came toward her vehicle, before he covered his face with a bandana. R.C. told the deputy he recognized Lua’s general appearance and voice. R.C. told the sheriff he was targeted because he associates with a gang called VPX.

Two days later, Melissa and R.C. spoke with a detective and again identified Lua as the assailant. Both Melissa and R.C. identified Lua in a photo lineup. R.C. reported that during the attack, someone yelled, “Nae-Nae, get back in the car, let’s go.” R.C. reconfirmed his belief he was targeted due to his gang association. He told the detective he did not want his name in the report and would not want to testify because doing so would make him a bigger target. Melissa reported Lua had contacted R.C. one month earlier and stated, “Hey, motherfucker, you know who I am. I’m Psycho Nae-Nae. You want to get down or you want to get smoked. You’re lucky your mother is here.” The detective also spoke with Lua, who acknowledged his membership in the Sur Trece gang and that he goes by the moniker “Nae-Nae” but not the moniker “Psycho.”

At trial, Melissa’s testimony describing the incident was generally consistent with what she previously reported to law enforcement. However, she claimed at trial she was previously mistaken about Lua’s involvement. She explained she was familiar with Lua and his monikers “Psycho” and “Nae-Nae” because she knows his family very well. She had assumed Lua was the assailant because he had been referred to as “Psycho” during the attack, but she later learned several other young people go by this moniker. She denied she ever saw Lua’s face during the encounter. She testified she spoke with an acquaintance, Ramon B., shortly after the attack and told Ramon she identified Lua based on the use of the nickname Psycho and had not seen his face during the incident. She

also testified she was not present for the other threats Lua made against R.C. a month before the attack, although she did call 911 regarding those threats. She acknowledged she had denied any recall of the incident at the preliminary hearing. She also acknowledged her prior contrary statements to law enforcement but maintained at trial that Lua was not the assailant.

In his trial testimony, R.C. acknowledged he was stabbed but claimed to have no recall of any details of the encounter. He denied telling his mother Lua had threatened him a month before the stabbing. He denied he is a gang member or associates with gang members. He was able to identify Lua in court because he had seen him around town and Lua was known to R.C.'s family; however, R.C. did not personally know Lua.

A gang expert testified Planet Sur Trece (PST) is a subset of the Sureno criminal street gang, and Vario Planet X (VPX) is a subset of the Norteno criminal street gang. The expert explained PST and VPX are in an "ongoing war" for control of the town where the stabbing occurred. The expert was personally familiar with Lua and identified him as an active member of PST. The expert was presented with hypothetical facts resembling those of this case and opined the conduct at issue would be gang-related and would benefit the gang.

Lua presented an alibi defense. His mother, sister, and brother-in-law testified that Lua and his mother were in another town on the night of the incident, babysitting his sister's children into the early morning hours.

## **DISCUSSION**

### **I. Enhanced Sentence on Count 4**

In count 4, Lua was convicted of dissuading a witness in violation of section 136.1, subdivision (b), with a gang enhancement pursuant to section 186.22, subdivision (b)(4)(C). Based on the gang enhancement, Lua was sentenced to a term of 14 years to life on this count. Because the enhancement applies only to a violation of section 136.1, subdivision (c), Lua contends he was effectively convicted of a

subdivision (c) offense without adequate notice and in violation of his right to due process. We conclude Lua was convicted under section 136.1, subdivision (b); the enhancement pursuant to section 186.22, subdivision (b)(4)(C) is therefore inapplicable and the enhanced sentence on count 4 is unauthorized. For the reasons stated below, we reject the People's contentions that Lua forfeited this issue and the manner of presentation of the case to the jury had the effect of amending the information to allege a violation of section 136.1, subdivision (c).

**A. Relevant Procedural and Factual Background**

Lua was originally charged in count 4 with dissuading a witness in violation of section 136.1, subdivision (b) with a gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), the subdivision applicable to violent felonies. After Lua rejected a plea offer of 16 years, the prosecutor amended the information to allege a gang enhancement pursuant to section 186.22, subdivision (b)(4), which requires imposition of an indeterminate sentence and is applicable to felony convictions for "threats to victims and witnesses, as defined in Section 136.1."<sup>6</sup> (§ 186.22, subd. (b)(4)(C).)

The evidence presented at trial suggested Lua had dissuaded Melissa from reporting the stabbing and threats against R.C. to law enforcement by stating, "Call the cops, bitch, you're next." Lua's defense was he was not the individual who had made this statement.

The jury was instructed with CALCRIM No. 2622, the instruction applicable to offenses falling within section 136.1, subdivisions (a) and (b). More specifically, the jury was instructed the People were required to prove Lua "maliciously tried to prevent or discourage" Melissa from making a report to the sheriff that she or her son were victims

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<sup>6</sup> At oral argument, the Deputy Attorney General conceded the information was defective in alleging a section 186.22, subdivision (b)(4) enhancement in conjunction with a charged violation of section 136.1, subdivision (b)(1).

of a crime.<sup>7</sup> The jury also was instructed with CALCRIM No. 2623, the instruction applicable to offenses falling within section 136.1, subdivision (c), which informed the jurors that, if they found Lua guilty of intimidating a witness, they were required to decide whether the People proved the additional allegations that the defendant acted maliciously and “used force or threatened, either directly or indirectly, to use force or violence on the person or property of a witness.” The jury was provided a general instruction in support of all of the gang enhancements, which stated the People were required to prove Lua committed the crime for the benefit of or in association with the gang, and with the intent to assist, further, or promote criminal conduct by gang members.<sup>8</sup>

The jury found Lua guilty on count 4 in a verdict form stating as follows: “We, the jury in the above entitled cause, find the defendant LUIS ANGEL LUA GUILTY of Dissuading A Witness From Reporting A Crime, a violation of Section 136.1(b)(1) (PC1192.7(C)(37) of the California Penal Code, a felony, Count 4 of the Information.” The jury also found true the special allegation that Lua “acted maliciously and used force or threatened, either directly or indirectly, used [*sic*] force or violence on the person or property of a witness.” Additionally, the jury found true the special allegation that the offense was “committed for the benefit of, at the direction of, and in association with a

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<sup>7</sup> Maliciousness is an element of the offenses under section 136.1, subdivisions (a) and (c). It is not an element of the offense under section 136.1, subdivision (b). (§ 136.1; *People v. Torres* (2011)198 Cal.App.4th 1131, 1138 (*Torres*).)

<sup>8</sup> The record on appeal is devoid of any substantive discussion regarding the jury instructions or verdict forms. Proposed instructions were provided to counsel but are not contained in the record. The court instructed counsel to email the court with comments on or objections to the proposed instructions. Some comments apparently were submitted, as they were referred to by the court in a general fashion. The court reminded counsel to put any objections on the record prior to the instructions being given. However, the record reflects no further discussion regarding instructions, and the court proceeded to instruct the jury immediately after the close of evidence.

criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members as set forth in Penal Code Section 186.22(b).”

The original abstract of judgment reflects Lua was convicted on count 4 of dissuading a witness pursuant to section 136.1, subdivision (b) and was sentenced to a term of 14 years to life. The abstract did not note the gang enhancement or prior strike conviction that served to increase the sentence on count 4. As noted, the indeterminate sentence prompted CDCR to suggest count 4 required resentencing. The trial court then purported to correct the abstract of judgment to reflect Lua was convicted pursuant to section “136.1(b)(1)(c),” a subdivision which does not exist. The amended abstract of judgment likewise does not note the gang enhancement or prior strike conviction. Upon amendment of the offense, the sentence remained unchanged at 14 years to life.

#### **B. Relationship between Sections 136.1 and 186.22**

Section 136.1 “defines a family of 20 related offenses” made up of five potential underlying crimes, each of which becomes a greater offense if it involves any of four sets of circumstances.<sup>9</sup> (*Torres, supra*, 198 Cal.App.4th at pp. 1137-1138.) The five

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<sup>9</sup> Section 136.1 provides, in relevant part:

“(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. [¶] (2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. [¶] (3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for

underlying crimes are set out in subdivisions (a) and (b), which are wobblers alternately punishable as misdemeanors or felonies. The aggravating circumstances that convert a subdivision (a) or (b) offense to a straight felony are set out in subdivision (c). As explained in *Torres*:

“Subdivision (a)(1) proscribes knowingly and maliciously preventing or dissuading any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law, and subdivision (a)(2) proscribes attempting to do so.

“Subdivision (b) proscribes three other wobblers with the common element of attempting to prevent or dissuade a crime victim or witness from doing any of the following: reporting the victimization to anyone in law enforcement, including a law enforcement officer, a peace officer, probation, parole, or correctional officer, a prosecuting agency, or a judge (subd. (b)(1)); causing a complaint, indictment, information, probation or parole violation to be prosecuted and assisting in the prosecution

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not more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. [¶] (2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof. [¶] (3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person. [¶] (2) Where the act is in furtherance of a conspiracy. [¶] (3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section. [¶] (4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.”

(subd. (b)(2)); or seeking or causing the arrest or arresting a person in connection with “that victimization” (subd. (b)(3)). Unlike the subdivision (a) offenses, the subdivision (b) offenses do not expressly include the mental element of knowingly and maliciously. The sentence range for these wobblers as felonies is not otherwise specified, so it is 16 months, two or three years. (§ 18.)

“Under any one of four sets of circumstances specified in section 136.1, subdivision (c), each of the wobblers becomes a straight felony when it is committed knowingly and maliciously. These greater offenses are subject to a higher range of punishment, namely two, three, or four years in prison. [Citations.] One specified circumstance is when the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person. (Subd. (c)(1).)” (*Torres, supra*, 198 Cal.App.4th at p. 1138, fn. omitted.)

Importantly, the aggravating factors set out in subdivision (c)(1) are not enhancements or sentencing factors to be determined through special findings, but rather “must be recognized as describing a greater offense with its own alternative and separate sentencing scheme.” (*Id.* at p. 1147.)

Section 186.22, subdivision (b) imposes sentencing enhancements for felony offenses where the jury determines the crime was committed for the benefit of a criminal street gang.<sup>10</sup> (§ 186.22, subd. (b); *People v. Anaya* (2013) 221 Cal.App.4th 252, 267.) More specifically, subdivision (b)(4) imposes a term of life in prison for the following crimes: home invasion robbery (§ 213, subd. (a)(1)), carjacking (§ 215), felony shooting at an inhabited building (§ 246), infliction of great bodily injury while discharging a firearm from a vehicle in the commission of a felony (§ 12022.55), extortion (§ 519) or

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<sup>10</sup> Subdivision (b)(1)(A) imposes an additional term of imprisonment of two, three, or four years generally for felonies committed for the benefit of a gang. (§ 186.22, subd. (b)(1)(A).) Subdivision (b)(1)(B) imposes an additional term of five years if the felony is a serious felony as defined in section 1192.7, subdivision (c). (§ 186.22, subd. (b)(1)(B).) Subdivision (b)(1)(C) imposes an additional term of ten years if the felony is a violent felony as defined in section 667.5, subdivision (c). (§ 186.22, subd. (b)(1)(C).)

“threats to victims and witnesses, as defined in Section 136.1.” (§ 186.22, subd. (b)(4)(B), (C).) The minimum term of the indeterminate sentence is the greater of two alternatives. “The first alternative is the term that would otherwise be imposed pursuant to section 1170 for the underlying conviction, including any enhancements. (§ 186.22, subd. (b)(4)(A).) The second alternative depends on the crime committed.... The minimum term is seven years if the crime is ‘extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.’ (§ 186.22, subd. (b)(4)(C).)” (*Anaya, supra*, 221 Cal.App.4th at pp. 267-268.)

The relationship between section 136.1 and section 186.22, subdivision (b)(4)(C) is well-settled. Section 186.22, subdivision (b)(4)(C) refers to “threats to victims or witnesses, *as defined in Section 136.1.*” “Only subdivision (c)(1) of section 136.1 refers to the use of an implied or express threat. Therefore, the plain meaning of section 186.22, subdivision (b)(4)(C) is that a seven-year-to-life sentence can be imposed only if the jury convicts the defendant of attempting to dissuade a witness by use of an implied or express threat of force pursuant to section 136.1, subdivision (c)(1).” (*Lopez, supra*, 208 Cal.App.4th at p. 1065.)

### **C. Analysis**

As we have now stated repeatedly, Lua was charged with a violation of section 136.1, subdivision (b)(1). The information did not allege the additional element of threat or force required to prove a violation of section 136.1, subdivision (c)(1). When the prosecutor amended the information to allege a gang enhancement pursuant to section 186.22, subdivision (b)(4), she did not amend the substantive offense. The verdict form specifically asked the jury to determine whether Lua had violated section 136.1, subdivision (b)(1), and described that offense as a serious felony pursuant to section 1192.7(c)(37).<sup>11</sup> The trial court’s abstract of judgment initially reflected that

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<sup>11</sup> “As used in this section, ‘serious felony’ means any of the following: ... (37) intimidation of victims or witnesses, in violation of Section 136.1 ....” (§ 1192.7,

Lua was convicted under section 136.1, subdivision (b)(1), before it later was amended to allege a violation of subdivision “(b)(1)(c),” a nonexistent subdivision. At no point was Lua charged with or convicted of a violation of section 136.1, subdivision (c). Accordingly, based on the information, verdict, and judgment, the enhanced sentence imposed pursuant to 186.22, subdivision (b)(4) is unauthorized. (*Lopez, supra*, 208 Cal.App.4th at p. 1065.)

The People ask us to set aside these facts and conclude nonetheless that Lua was convicted of a violation of section 136.1, subdivision (c), because the jury was instructed on that offense and made a special finding as to its elements. The People claim the instruction and verdict constituted an informal amendment to the information to which Lua acquiesced. Additionally, the People contend Lua forfeited any claim this informal amendment provided him inadequate notice in violation of due process by failing to object below.

Our analysis is guided by one of the most fundamental principles of due process: an accused cannot be convicted of an offense of which he has not been charged, regardless of whether the evidence at trial establishes he committed that offense. (*People v. Toro* (1989) 47 Cal.3d 966, 973 (*Toro*), disapproved on another ground by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) This rule is subject to limited exceptions. Where the information refers to an erroneous statutory provision but provides notice as to all the elements of the intended offense, conviction may be had on the intended offense, despite the typographical error. (*People v. Thomas* (1987)

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subd.(c)(37).) Section 1192.7 does not refer to any specific subdivision of section 136.1, and section 136.1 does not itself refer to “intimidation.” Thus, this reference in section 1192.7 to section 136.1 is considered a shorthand description for section 136.1, generally, and “all felony violations of Penal Code section 136.1 are serious felonies.” (*People v. Neely* (2004) 124 Cal.App.4th 1258, 1266.) In contrast, both section 667.5, subdivision (c)(20), describing violent felonies, and section 186.22, subdivision (b)(4)(C) are limited to those provisions of section 136.1 that involve threats to victims or witnesses, i.e., subdivision (c)(1). (See *Lopez, supra*, 208 Cal.App.4th at p. 1065.)

43 Cal.3d 818, 824; *People v. Neal* (1984) 159 Cal.App.3d 69, 73-74 (*Neal*).) A defendant also may be convicted of any lesser offenses necessarily included within the charged offense, since the accusatory pleading puts the defendant on notice of the prosecution's intent to prove all elements of the lesser included offense. (*Toro, supra*, 47 Cal.3d at p. 973; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237 (*Valenzuela*).) Additionally, a defendant may expressly or impliedly consent to have the trier of fact consider a nonincluded offense by permitting the jury to consider verdict forms and instructions on that offense. (See *People v. Parks* (2004) 118 Cal.App.4th 1, 5-6 (*Parks*) [defendant may be convicted of a lesser related offense based on express or implied consent].)

The first of these exceptions does not apply here, because the information did not allege all the elements of a violation of section 136.1, subdivision (c)(1). Neither does the second exception apply, because section 136.1, subdivision (c)(1) is greater than the offense charged. (*Torres, supra*, 198 Cal.App.4th at p. 1147; *People v. Brenner* (1992) 5 Cal.App.4th 335, 341.) We are left then with the last exception – informal amendment by implied consent.

The informal amendment doctrine is typically applied to find a defendant has impliedly acquiesced in the charging of a lesser related offense. (*Valenzuela, supra*, 199 Cal.App.4th at p. 1237; see also *Parks, supra*, 118 Cal.App.4th at pp. 5-6.) While a defendant may have strategic reasons for consenting to conviction on an uncharged lesser related offense, “[c]onviction for an uncharged greater offense not only raises the problem of notice but makes the inference of consent more difficult, as there is no reason why a defendant should acquiesce in substitution of a greater for a lesser offense.” (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 623; see *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.)

Here, we have no basis to find implied consent to a greater charge. The record does not contain the proposed instructions or verdict forms or any of the comments or

objections submitted by email to the court. We do not know why the case was submitted to the jury with instructions and a verdict form requiring findings inapplicable to the charge. (Compare *People v. Houston* (2012) 54 Cal.4th 1186, 1226 [finding consent to greater charge where court clarified that the verdict forms had the effect of substituting a different charge and expressly told the parties to notify the court if that was not correct].) It would seem that only inadvertence or misapprehension of the law by the prosecutor, defense counsel, and the court, could explain requiring the jury to render a verdict on section 136.1, subdivision (b)(1), while simultaneously asking it to make a special finding on the elements of an uncharged, greater offense. Whatever the reason, the record does not permit us to deem Lua's silence a consensual amendment of the information. We therefore conclude Lua was convicted only of the offense charged, a violation of section 136.1, subdivision (b).

The People also seem to advance an alternative argument, that Lua could be subject to a life sentence under section 186.22, subdivision (b)(4)(C), although convicted of violating section 136.1, subdivision (b)(1), because the jury found he used threats or force in the commission of the offense. We reject this contention as contrary to *Lopez, supra*, 208 Cal.App.4th at p. 1065. As explained above, section 186.22, subdivision (b)(4)(C) applies where the accused has been *convicted* of a felony involving “threats to victims and witnesses, as defined in Section 136.1.” (§ 186.22, subd. (b)(4)(C).) Only subdivision (c)(1) of section 136.1 requires a finding of threats or force, and thus only a conviction under subdivision (c)(1) is subject to enhancement by section 186.22, subdivision (b)(4)(C). (*Lopez, supra*, at p. 1065.) A jury's special finding on this element does not support imposition of this gang enhancement absent conviction on this greater offense. (See *Torres, supra*, 198 Cal.App.4th at p. 1147 [the

additional threat or force element is not a sentencing factor but describes “a greater offense with its own alternative and separate sentencing scheme”].<sup>12</sup>

Finally, we reject the People’s forfeiture argument. Had we determined Lua impliedly consented to amendment of the information by acceding to jury instructions and a verdict form on the elements of section 136.1, subdivision (c), we would need to determine whether he forfeited his argument that this amendment provided inadequate notice he was subject to a life sentence. Instead, however, we have found no informal amendment, and are left only with the question of whether the sentence imposed for violation of section 136.1, subdivision (b) exceeds the maximum statutory sentence. This claim involves a question of law and is not subject to the ordinary forfeiture rule. (*People v. Anderson* (2010) 50 Cal.4th 19, 26.)

Having concluded the enhancement under section 186.22, subdivision (b)(4)(C) is inapplicable, we consider the remedy. Lua contends the matter must be conditionally reversed and remanded with directions to permit Lua to accept the prosecutor’s 16-year plea offer.<sup>13</sup> We conclude instead that the trial court should, on remand, strike the gang enhancement under section 186.22, subdivision (b)(4)(C), and impose the five-year gang

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<sup>12</sup> Nor do we necessarily agree that the jury’s special finding satisfied the requirements of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [requiring facts that increase the penalty for a crime beyond the statutory maximum to be submitted to a jury and proved beyond a reasonable doubt]. The jury found true that Lua used force or threats in dissuading a witness. The finding satisfied the elements of section 136.1, subdivision (c), which requires use of threats *or* force. However, the elements of section 136.1, subdivision (c) and 186.22, subdivision (b)(4)(C) are not entirely coterminous. Section 186.22, subdivision (b)(4)(C) applies only to the use of threats. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 55-56 [holding that specific findings of threats is required under subdivision (b)(4)(C) because “as a matter of law, the plain language referencing ‘threats’ in section 186.22, subdivision (b)(4)(C) does not encompass those offenses defined under section 136.1 that do not include the element of threat.”].)

<sup>13</sup> This remedy would result in an unwarranted windfall to Lua since his unchallenged sentence on count 2 alone involved a term of 18 years.

enhancement for serious felony convictions under section 186.22, subdivision (b)(1)(B). The information alleged every fact necessary to place Lua on notice he was subject to an enhanced sentence under section 186.22 and also alleged the violation of section 136.1, subdivision (b)(1), constituted a serious felony pursuant to section 1192.7, subdivision (c)(37). The jury found Lua had committed a violation of section 136.1, subdivision (b), and also found he had done so “for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members as set forth in Penal Code Section 186.22(b).” Section 186.22, subdivision (b)(1)(A) makes clear the length of the criminal street gang enhancement is dependent on the classification of the underlying felony. Section 186.22, subdivision (b)(1)(B), requires the imposition of an additional five-year term if the underlying offense is a serious felony. Imposition of this lesser enhancement is the proper remedy.<sup>14</sup> (See *Neal, supra*, 159 Cal.App.3d at pp. 72-73 [no due process violation by citation in information to wrong enhancement provision if defendant had notice prosecution was seeking enhanced punishment and the facts supporting enhancement].)

## **II. Exclusion of Testimony of Ramon B.**

The defense sought to introduce testimony from Melissa’s acquaintance Ramon B. regarding statements Melissa made to Ramon some time after the attack. The People objected on hearsay grounds. The defense argued the statements were admissible as prior consistent statements or, alternatively, prior inconsistent statements. The court concluded the testimony was not admissible on either ground. Lua contends this ruling was in error.

“ ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter

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<sup>14</sup> Given this conclusion, we do not reach Lua’s alternative argument that the court abused its discretion in permitting the prosecutor to amend the information to allege an enhancement under section 186.22, subdivision (b)(4) on count 4.

stated.” (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible except as provided by law. (Evid. Code, § 1200, subd. (b).) A witness’s prior statement that is inconsistent with his or her testimony at trial may be admitted into evidence under certain circumstances. (Evid. Code, §§ 770, 1235.) A witness’s prior statement that is consistent with his or her trial testimony may be offered into evidence to support the witness’s credibility if “[e]vidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement ....” (Evid. Code, § 791, subd. (a).) In other words, a prior consistent statement is admissible under this provision if the consistent statement was made before the alleged inconsistent statement. A prior consistent statement is also admissible to rebut a charge that the witness’s trial testimony is recently fabricated if the prior statement was made before the motive for fabrication is alleged to have arisen. (Evid. Code, § 791, subd. (b).) A challenge to a trial court’s rulings under these provisions is reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

Melissa’s alleged statement to Ramon B. stating that she did not see Lua’s face was consistent with her trial testimony. It does not qualify as a prior inconsistent statement under the Evidence Code. (Evid. Code, § 1235.)

The statement also was inadmissible as a prior consistent statement under Evidence Code section 791, subdivision (a). Here, the timeline of Melissa’s statement is crucial. Immediately following the incident, Melissa informed a sheriff’s deputy that she saw Lua’s face. Some time soon thereafter, she informed Ramon she did not see Lua’s face. The statement to Ramon was consistent with Melissa’s trial testimony. However, a prior consistent statement made *after* a prior inconsistent statement is inadmissible under Evidence Code section 791, subdivision (a).

We also conclude the court did not abuse its discretion in determining Melissa’s statement to Ramon did not constitute a prior consistent statement under Evidence Code

section 791, subdivision (b). The purpose of this hearsay exemption is to defeat an inference of recent fabrication by showing the witness made a prior consistent statement before the motive to fabricate arose. Thus, if “the consistent statement was made *after* an improper motive is alleged to have arisen, the statement is inadmissible.” (*People v. Gentry* (1969) 270 Cal.App.2d 462, 473.) Once again, the timing of the statement is critical. Here, one motive for Melissa to fabricate – that is, her fear of Lua and his gang associates – arose during the event itself, when Lua threatened both Melissa and R.C. Lua does not suggest any other basis for the fabrication. (See *People v. Hayes* (1990) 52 Cal.3d 577, 610.)

Regardless, exclusion of this testimony was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Under this standard, we ask whether it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*Watson, supra*, 46 Cal.2d at p. 836.) “[A]n appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively strong*, and the evidence supporting a different outcome is so *comparatively weak*, that there is no reasonable probability the error of which the defendant complains affected the result.” (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) In this regard, we note the jury was presented with testimony from three members of Lua’s family who contended he was out of town at the time of the assault. Additionally, Melissa testified she never saw Lua’s face and mistakenly identified him based on the use of the moniker Psycho. Melissa herself testified she told Ramon she did not see Lua’s face and identified him only based on the moniker. The jury necessarily rejected this testimony and instead credited Melissa and R.C.’s initial identification. Given the relative strengths of the evidence, it is not reasonably probable the jury would have reached a more favorable result had it heard cumulative testimony from Ramon affirming Melissa’s prior statement.

### **III. Prior Serious Felony Enhancement**

The trial court enhanced Lua's sentence by five years pursuant to section 667, subdivision (a). At the time, the court lacked discretion to do otherwise. As the applicable statutes then read, the court was required to impose a five-year consecutive term upon "any person convicted of a serious felony who previously ha[d] been convicted of a serious felony" (§ 667, former subd. (a)(1)), and it had no authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (§ 1385, former subd. (b)).

Senate Bill No. 1393 removed these restrictions, effective January 1, 2019. As Lua's case is not yet final, the People concede the amendments to sections 667, subdivision (a) and 1385, subdivision (b) apply to him. However, the People contend remand is not required because the court would not have stricken the enhancement.

We have already determined we must remand for resentencing on another ground, as stated above. On remand, the trial court is entitled to consider the entire sentencing scheme, including whether to exercise its discretion to strike the prior serious felony enhancement. (See *People v. Hill* (1986) 185 Cal.App.3d 831, 834.)

### **DISPOSITION**

The sentence imposed on count 4 is reversed and the matter is remanded to the trial court for resentencing. On remand and following resentencing, the trial court shall prepare an amended abstract of judgment reflecting the new sentence, shall correct the reference in count 4 to nonexistent Penal Code section 136.1, subdivision (b)(1)(c) to reflect Lua's proper conviction under Penal Code section 136.1, subdivision (b)(1), shall strike the section 186.22, subdivision (b)(4) gang enhancement on count 4, shall impose a gang enhancement on count 4 pursuant to section 186.22, subdivision (b)(1)(B), and shall

transmit the amended abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

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SNAUFFER, J.

WE CONCUR:

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FRANSON, Acting P.J.

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SMITH, J.